BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDGAR DOMINQUEZ[1]	)	
Claimant	)	
VS.	)	
	)	
GOTTSCHALK BROTHERS ROOFING	)	
Respondent	)	Docket No. **1,045,318**
AND	)	
	)	
KANSAS BUILDING INDUSTRY	)	
WORKERS COMPENSATION FUND	)	
Insurance Carrier	)	

ORDER

Claimant appealed the June 10, 2010, Award entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Workers Compensation Board heard oral argument on September 8, 2010. On October 25, 2010, the Division's Acting Director, Seth G. Valerius, appointed a Pro Tem Board Member in place of Carol Foreman, who retired. On March 18, 2011, the Division's Acting Director, Anne Haught, rescinded the Pro Tem appointment as the vacant position on the Board had been filled.

APPEARANCES

Randy S. Stalcup of Andover, Kansas, appeared for claimant. Roy T. Artman of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

In the June 10, 2010, Award, ALJ Barnes found claimant sustained a 9 percent whole body functional impairment after averaging the 5 percent rating provided by

[1] The Division's records and parts of the record in this matter both reflect a spelling of claimant's last name as Dominguez. Claimant's attorney represents claimant's last name is spelled Dominquez.

Dr. Pat D. Do and the 13 percent rating provided by Dr. Pedro A. Murati. The ALJ determined claimant did not prove he was entitled to an award for a work disability[2] and, therefore, awarded claimant disability benefits based upon the 9 percent whole person functional impairment. The ALJ reasoned:

> Claimant seeks a work disability award in excess of his functional impairment rating. The claimant admits that he used a fraudulent social security number to obtain employment with respondent and that he is not a legal immigrant. The court finds that claimant has failed to present credible evidence and failed to meet his burden of proof that he is entitled to a work disability award. Therefore, claimant is entitled to an award of compensation based on a 9 percent impairment of function to the body as a whole.[3]

Claimant argues he is entitled to an award for a work disability. Claimant maintains the use of an inappropriate Social Security number in obtaining employment does not, *ipso facto*, render a work disability claim impossible or inappropriate. Claimant contends he is entitled to receive an award for a 51 percent work disability or, in the alternative, a 25 percent work disability.

Respondent contends the Award should be affirmed. Respondent argues there is little question that a primary goal of the Workers Compensation Act is to return injured employees to work and that when the employee cannot legally work in the United States, the employer cannot return the employee to work without violating the law (again). Respondent also argues the work disability formula is premised upon an open labor market, an illegal worker does not have access to that market and, therefore, respondent asserts that an illegal worker's permanent partial general disability should be measured by the worker's whole person functional impairment rating.

The only issue before the Board on this appeal is the nature and extent of claimant's injuries and disability.

FINDINGS OF FACT

After reviewing the entire record, the Board finds and concludes:

It is undisputed that on January 11, 2009, claimant was working for respondent when he fell through a hole in a roof and landed on concrete some 13 to 14 feet below. It is also undisputed at the time of the accident claimant was respondent's employee. The

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[2] A permanent partial general disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

[3] ALJ Award (June 10, 2010) at 4.

fall knocked claimant unconscious and he was taken by ambulance to the hospital, where he was treated for several days.

Claimant ultimately began receiving treatment from Dr. Pat D. Do, who performed arthroscopy on claimant's left knee and also treated his right elbow. Another doctor in Dr. Do's clinic, Dr. David Hufford, treated the compression fracture in claimant's thoracic spine. Dr. Do released claimant from medical treatment with no permanent work restrictions in September 2009.

Claimant testified at the regular hearing that he has chronic pain in his right elbow, left knee, and back that he attributes to his accident. Moreover, he testified that he has problems with memory and verbalizing his thoughts.

The record includes two functional impairment ratings. Dr. Do, a board-certified orthopedic surgeon, rated claimant in September 2009 and determined claimant had a 2 percent whole person impairment for the compression fracture in his thoracic spine at T11, a 2 percent impairment to the right upper extremity for the lateral and medial epicondylitis in his elbow, and a 3 percent lower extremity impairment for chondroplasty of the medial femoral condyle in the left knee, all of which the doctor combined for a 5 percent whole person impairment under the AMA *Guides*.[4]

At his attorney's request, claimant was evaluated by Dr. Pedro A. Murati, who has multiple board certifications, including physical medicine/rehabilitation, electrodiagnosis and independent medical evaluations. Dr. Murati examined claimant in late September 2009 and rated claimant as having a 10 percent impairment to the right upper extremity (6 percent whole person) for carpal tunnel syndrome, a 5 percent whole person impairment for the T11 compression fracture, and a 5 percent impairment to the left lower extremity (2 percent whole person) for left patellofemoral syndrome in the left knee, all of which the doctor attributed to claimant's January 2009 accident and all of which combined for a 13 percent whole person impairment under the AMA *Guides*.[5]

The ALJ gave equal weight to the rating opinions of the two medical experts and averaged the 5 and 13 percent whole person functional impairment ratings to find claimant's functional impairment was 9 percent to the whole person. The parties have not challenged the ALJ's finding of functional impairment on this appeal and, thus, the Board adopts that finding as its own.

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[4] Do Depo. at 11-12. The AMA *Guides* refers to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[5] Murati Depo. at 10.

Dr. Murati, unlike Dr. Do, felt that claimant's work activities should be permanently restricted. In his September 30, 2009, report, Dr. Murati merely noted that claimant was to use common sense and work as tolerated. But the doctor was later told more specific restrictions were needed and Dr. Murati responded with the following:

> In an 8-hour day no ladders, . . . no squatting, no crawling, no driving manual stick shift, no kneeling, no repetitive foot controls with the left, no heavy grasp with the right, and no lift/carry, push/pull greater than 35 pounds. Rarely climb stairs, climb ladders. Occasional stand, walk, bend, crouch and stoop and repetitive grasp with the right. Frequent right repetitive hand controls and lift/carry, push/pull to 20 pounds. No use of hooks or knives or vibratory tools with the right arm and no lift below knuckle height.[6]

Claimant's attorney hired labor market expert Jerry D. Hardin to compile a list of the work tasks that claimant performed in the 15 years leading up to his January 2009 accident. Dr. Murati reviewed that list of former work tasks and adopted Mr. Hardin's opinions regarding those tasks that claimant should refrain from performing due to the January 2009 accident. Accordingly, Dr. Murati agreed that claimant had lost the ability to perform 16 of the 31 former work tasks (or 52 percent), when duplicate tasks are excluded from consideration.

The Board finds claimant has lost the ability to perform 26 percent of his former work tasks. That is an average of the 52 percent task loss percentage opined by Dr. Murati and, in essence, the zero percent task loss percentage provided by Dr. Do. The Board believes the doctors' opinions regarding claimant's ability to return to work should be given equal weight as neither opinion is more persuasive than the other.

In December 2009 claimant obtained janitorial work. Claimant testified at his regular hearing in February 2010 that he was then earning $900 per month, which is the equivalent of $207.69 per week. That is the only work claimant has performed since his January 2009 accident. Comparing claimant's post-injury wage to the stipulated pre-injury wage of $414.48 per week, claimant has experienced a wage loss of 50 percent.

Claimant is from Mexico and he does not have his own social security number. When he was 15 years old while in Texas he purchased the social security card and number he utilized to obtain employment with respondent. In 2005 he petitioned the United States government for a visa and to immigrate to the United States. But he received a letter in April 2009 that stated no visa numbers were then available and that the U.S. Department of State had no way of predicting when it would be possible to proceed with his immigrant visa application.

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[6] *Id.* at 11-12.

Despite the lack of a visa, claimant has worked for several employers in the United States. Claimant's work history includes three months at McDonald's, over three and one-half years at Rubbermaid, almost six years at International Cold Storage, and a couple of months with respondent. Because claimant does not have a valid social security number assigned to him, respondent maintains it is unable to accept him back to work. Indeed, respondent's president testified that claimant would not have been hired had respondent known that claimant did not have his own social security number.

CONCLUSIONS OF LAW

Claimant has obtained other employment following his accident and there is no medical expert opinion that claimant is incapable of performing substantial and gainful employment. Accordingly, claimant is not entitled to receive permanent total disability benefits under K.S.A. 44-510c, notwithstanding any presumption that might arise due to his injuring multiple extremities.

Because claimant has a back injury, which does not fall within the schedule of K.S.A. 44-510d, the calculation of claimant's permanent partial disability benefits is governed by K.S.A. 44-510e, which provides, in part:

> **The extent of permanent partial general disability** shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has **lost the ability to perform the work tasks** that the employee performed in any substantial gainful employment **during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

When a worker sustains both a scheduled injury as identified by K.S.A. 44-510d and an unscheduled injury, the Kansas Supreme Court has held that the worker's disability benefits are determined under K.S.A. 44-510e.

> K.S.A. 44-510d contains the schedule for compensation for certain permanent partial disabilities. . . . K.S.A. 44-510e covers compensation for permanent partial general disabilities, and thus covers those not included in the

> 44-510d schedule. If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.[7]

In *Bergstrom*,[8] the Kansas Supreme Court made clear that the language of K.S.A. 44-510e is clear and unambiguous and its express language should be applied without attempting to determine what the law should or should not be. Consequently, *Bergstrom* overruled a host of opinions that had held a worker's post-injury wage would be imputed unless the worker had shown good faith in seeking post-injury employment. The Kansas Supreme Court stated, in pertinent part:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[9]
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> K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.[10]
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> We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when the employee "*is engaging* in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is*

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[7] *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

[8] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[9] *Id.*, Syl. ¶ 1.

[10] *Id.*, Syl. ¶ 3.

> *capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.[11]

After *Bergstrom* there is no requirement for a nexus between the claimant's injury and the subsequent wage loss. In *Tyler*[12], the Kansas Court of Appeals stated: "Absent a specific statutory provision requiring a nexus between the wage loss and the injury, this court is not to read into the statute such a requirement."

In the absence of *Bergstrom*, claimant's failure to have a valid social security number would have been an issue for the ALJ and Board to consider in determining whether claimant's actual post-injury wages should be used in computing his permanent partial general disability benefits. In fact, prior to *Bergstrom* the Board had consistently held that an undocumented worker who cannot lawfully access the United States labor market was ineligible for a work disability. But, *Bergstrom* stands for the proposition that neither the ALJ nor this Board is provided with the authority to announce public policy for the State. Consequently, the express language of K.S.A. 44-510e is observed and claimant's actual post-injury earnings must be used in computing his permanent partial general disability.

The permanent partial general disability formula under K.S.A. 44-510e is an average of the worker's wage loss and task loss. Claimant is now earning 50 percent less than his pre-injury wage. Accordingly, claimant's 50 percent wage loss is averaged with his 26 percent task loss, which creates a 38 percent work disability.

In summary, the June 10, 2010, Award should be modified to award claimant a 38 percent work disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[13] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the June 10, 2010, Award entered by ALJ Nelsonna Potts Barnes.

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[11] *Id.*, at 609-610.

[12] *Tyler v. Goodyear Tire & Rubber Co.,* 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010).

[13] K.S.A. 2009 Supp. 44-555c(k).

Edgar Dominquez is granted compensation from Gottschalk Brothers Roofing and its insurance carrier for a January 11, 2009, accident and resulting disability. Based upon an average weekly wage of $414.48, Mr. Dominquez is entitled to receive 35.43 weeks of temporary total disability benefits at $276.33 per week, or $9,790.37, plus 149.94 weeks of permanent partial disability benefits at $276.33 per week, or $41,432.92, for a 38 percent work disability, making a total award of $51,223.29.

As of March 25, 2011, there is due and owing to the claimant 35.43 weeks of temporary total disability compensation at $276.33 per week, or $9,790.37, plus 79.28 weeks of permanent partial general disability compensation at $276.33 per week, or $21,907, for a total due and owing of $31,697.81 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $19,525.48 shall be paid at $276.33 per week until paid or until further order of the Director.

The ALJ approved claimant's attorney fees. The record, however, does not contain a written attorney fee contract between the claimant and his attorney. A reasonable fee shall be awarded in accordance with K.S.A. 44-536 upon presentation of the written attorney fee contract and subject to the Director's approval. The provision in the Award approving claimant's attorney fees is set aside.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this 31st day of March, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned Board Members respectfully dissent from the opinion of the majority. Claimant acknowledged that he does not have a valid social security number. The permanent partial general disability portion of the award is determined, in part, on claimant's wage earnings as compared to his average weekly wage from the date of accident. K.S.A. 44-510g(a) states: "A primary purpose of the workers compensation act shall be to restore the injured employee to work at a comparable wage." Claimant's alien status makes it a legal impossibility to satisfy this purpose. *Bergstrom* requires that the language of the statutes be followed and applied by the fact finder. The implied "public policy" determination by the ALJ should be based on the specific language of K.S.A. 44-510g(a). So long as it is claimant's status which bars him from even seeking employment in this country, the purpose of the statute remains an impossibility. Claimant's award should be limited to his functional impairment.[14]

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BOARD MEMBER

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BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[14] See *Martinez v. Gilmore Roustabout Service*, No. 1,002,214, 2003 WL 22704164 (Kan. WCAB Oct. 17, 2003); and *Zepeda v. Nancy & Nora Flores d/b/a L&F Originals, LLP*, No. 1,023,273, 2006 WL 1933443 (Kan. WCAB June 15, 2006).